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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|--|-------------|----------------------|---------------------|------------------|
| 10/720,459 | 11/24/2003 | Eric W. Triplett | WIS4987P0321US | 4079 |
| 32116 | 7590 | 09/19/2007 | EXAMINER | |
| WOOD, PHILLIPS, KATZ, CLARK & MORTIMER | | | MARX, IRENE | |
| 500 W. MADISON STREET | | | ART UNIT | PAPER NUMBER |
| SUITE 3800 | | | 1651 | |
| CHICAGO, IL 60661 | | | MAIL DATE | DELIVERY MODE |
| | | | 09/19/2007 | PAPER |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | |
|---|--------------------------------------|--------------------------------------|
| Advisory Action Before the Filing of an Appeal Brief | Application No. | Applicant(s) |
| | 10/720,459 Examiner Irene Marx | TRIPPLETT ET AL. Art Unit 1651 |

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 07 September 2007 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. The reply was filed after a final rejection, but prior to filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:
 - a) The period for reply expires 4 months from the mailing date of the final rejection.
 - b) The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. The reply was filed after the date of filing a Notice of Appeal, but prior to the date of filing an appeal brief. The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
 - (a) They raise new issues that would require further consideration and/or search (see NOTE below);
 - (b) They raise the issue of new matter (see NOTE below);
 - (c) They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 - (d) They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: see attachment. (See 37 CFR 1.116 and 41.33(a)).

4. The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. Applicant's reply has overcome the following rejection(s): _____.
6. Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).

7. For purposes of appeal, the proposed amendment(s): a) will not be entered, or b) will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: 1, 4 and 5.

Claim(s) withdrawn from consideration: 13.

AFFIDAVIT OR OTHER EVIDENCE

8. The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).

10. The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. The request for reconsideration has been considered but does NOT place the application in condition for allowance because: see attachment.
12. Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). _____
13. Other: _____.



Irene Marx
Primary Examiner
Art Unit: 1651

Art Unit: 1651

Note:

The proposed amendment raises new issues that would require further consideration and/or search with respect to the amendments to claim 1 to delete "and mutant strains derived therefrom" including new issues under 35 U.S.C § 112. New issues are also raised by the added claims 18-20 that would required further consideration and/or search, for example, regarding the growth of *Poa pretensis*, the increase in shoot weight of any plant whatsoever and increase in grain or seed yield for any plant whatsoever, including new issues under 35 U.S.C § 112.

The information disclosure statement filed 9/7/07 fails to comply with 37 CFR 1.97(d) because it lacks a statement as specified in 37 CFR 1.97(e). It has been placed in the application file, but the information referred to therein has not been considered.

Response to Arguments

Applicant's arguments have been fully considered to the extent that they pertain to the claims now of record but they are not deemed to be persuasive.

The Triplett declaration is missing the penalty paragraph and is not deemed timely.

The arguments directed to Remus are noted. However, the title of the paper and the related statements by counsel regarding a personal communication of Dr. Ruppel clearly suggest that the strain of the reference is in fact suitable for growth promotion. That it was incorrectly classified originally is not probative of differences with the instantly claimed strains or mutants.

Applicants comments regarding the internal designation of bacterial strains as well as the sites of isolation are noted. However, the crux of the rejection is directed to strains of bacteria of the same species that share identical or at least very similar properties.

The Patent and Trademark Office is not equipped to conduct experimentation in order to determine whether or not applicants' cultured strains and their mutants differ and, if so, to what extent, from the strains discussed in the references. Accordingly, inasmuch as the examiner has established that each of the prior art strains, which are of the same species *K. pneumoniae* as that claimed, likewise share the property of being able to promote the growth of plants at least to some extent, she has reasonably demonstrated a reasonable likelihood/possibility that the compared strains are either identical or sufficiently similar that whatever differences exist are not patentably significant. Therefore, the burden of establishing non-obviousness by objective evidence shifted to Applicants. Applicants have not met that burden.

Art Unit: 1651

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Irene Marx whose telephone number is (571) 272-0919. The examiner can normally be reached on M-F (6:30-3:00).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael G. Wityshyn can be reached on 571-272-0926. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Irene Marx
Irene Marx
Primary Examiner
Art Unit 1651